IN THE

Supreme Court of the United States

October Term, 1978

No. 78-112

WILLIAM MIEBACH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 18, 1978

CRAFTSMAN PRESS SEATTLE, WASHINGTON

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978
No.

WILLIAM MIEBACH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

William Miebach petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 21, 1978.

OPINIONS BELOW

The transcript of the District Court's oral opinion denying Defendant's Motion to Suppress is attached as Appendix "A." The District Court's formal Order Denying Defendant's Motion to Suppress and Return Property Seized, and Written Findings of Fact is attached as Appendix "B." The transcript of the District Court's oral findings of guilt is attached as Appendix "C." The Court of Appeals' opinion, entered June 21, 1978, affirming the judgment of conviction by the District Court, is attached as Appendix "D."

JURISDICTION

The Court of Appeals entered its judgment on June 21, 1978. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1) and Supreme Court Rule 22(2).

QUESTION PRESENTED

1. Whether the telephone company can conduct warrantless wiretapping for the sole purpose of gathering evidence for a criminal prosecution under the fol-

lowing facts and circumstances:

(a) The alleged violation of the federal criminal code is not one for which court-ordered wiretapping will lie under 18 U.S.C. § 2516;

(b) The phone company did not conduct the wiretapping as a "necessary incident to . . . the protection of /its/ rights or property." 18 U.S.C. § 2511(2)(a)(i);

(c) From its inception, the wiretapping was conducted as a continuum of effort to obtain either a state or federal prosecution;

(d) The wiretapping was conducted without prior showing of probable cause to a neutral and detached magistrate and without sufficient minimization, particularity, and limitations on duration, as required by the Fourth Amendment to the Constitution of the United States and statutory protections, 18 U.S.C. § 2510-20.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved, 18 U.S.C. §§ 2510-20 (1976), are attached as Appendix "E."

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Late in 1976, Pacific Northwest Bell Telephone Company's computer produced a printout which indicated a toll fraud scheme, using a "blue box" device, was being initiated from a telephone number in Seattle. Pacific Northwest Bell's security representative, utilizing the printout, set about the process of gathering evidence for the purpose of obtaining a prosecution. The security representative attached a pen

register device to the offending telephone number. On the basis of the information provided by the pen register, the telephone company approached the state authorities for the purpose of initiating a prosecution for violation of Wash. Rev. Code § 9.45.240.

The local County Prosecutor obtained a search warrant from a state court judge for the home of the telephone subscriber from whose telephone line the "blue box" signals were being transmitted. However, upon execution of the search warrant, no evidence of the crime could be found. The local authorities and the phone company concluded the subscriber was not involved in the scheme to defraud the telephone company.

Representatives of the telephone company continued their investigation. By physical inspection of the offending telephone line they determined only two residences had access to it: one was that of the subscriber which had previously been searched, and the other was that of the Petitioner and his co-defendant. The telephone company and the County Prosecu-

tor did not seek an additional warrant for the only other possible suspects, the Petitioner and his co-defendant; rather, the telephone company placed a tape recorder on the pen register and proceeded to record the contents of phone conversations with the intention of building a case for a federal prosecution. The telephone company had previously concluded that aural interception is "necessary" under 18 U.S.C. 2511(2)(a)(i) if a federal prosecution will lie.

After spending a period of time recording conversations, Pacific Northwest Bell contacted the United States Attorney, who then contacted the FBI. Subsequently, the fruits of the telephone company's investigation, including the recordings made through the wiretap, were subpoenaed by the federal grand jury. This material became the basis upon which a federal search warrant was issued and executed at the home of the Petitioner and his co-defendant.

At no time has the telephone company attempted to initiate any civil action to recover lost revenues from the Petitioner or his co-defendant. Nor, with

one exception, has Pacific Northwest Bell ever instituted any civil proceeding to recover revenues lost in a "blue box" toll fraud. It is the policy of the telephone company and its Pacific Northwest affiliate to conduct telephone fraud investigations only for the purpose of gathering evidence for prosecution.

The entire grand jury and FBI investigation was the fruit of Pacific Northwest Bell's warrantless wiretap. All other evidence in the matter was gathered pursuant to a search warrant issued by the United States Magistrate; the showing of probable cause for this search warrant was based upon the wiretaps.

These and other facts came to light at a hearing on a motion to suppress the wiretaps and the fruits of the search warrant. The motion was denied. Subsequently, the Petitioner and his co-defendant were convicted. This conviction was affirmed by the Court of Appeals on June 21, 1978.

REASONS FOR GRANTING THE WRIT

1. Statutory Misconstruction

This Court should grant this petition to consider a question of importance in the administration of federal justice. The Court of Appeals opined that the telephone company has broad discretion to perform warrantless wiretaps whenever it suspects the existence of a toll fraud scheme, to investigate for the sole purpose of pursuing a prosecution, and to turn over the fruits of its warrantless search to the federal authorities. In doing so, the Court of Appeals has misconstrued 18 U.S.C. § 2511(2)(a)(i).

Legislative history suggests that §§ 2510-20 prohibit all wiretapping except for narrowly defined exceptions, and then only when authorized by a neutral and detached magistrate upon a showing of probable cause. In 1968, Congress found that:

> To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories

> of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.

Om bus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 801, 82 Stat. 211-12 (1968).

This Court recognized those limitations in Alderman v. United States, 394 U.S. 165, 175 (1969): "The general rule under the statute is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant." See also United States v. Donovan, 429 U.S. 413, 437 n. 25 (1977):

> In limiting use of the intercept procedure to "the most precise and discriminate circumstances," S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968), Congress required law enforcement authorities to convince a District Court that probable cause existed to believe that a specific person was committing a specific offense using a specific telephone.

The Court of Appeals determined the telephone company may conduct warrantless wiretaps to further criminal prosecutions, in clear derogation of the general statu-

tory prohibitions. For this reason, this Court should grant certiorari.

The interception and disclosure of wire communications is authorized only for those crimes enumerated in § 2516. Telephone toll fraud is not among the crimes listed in § 2516. This statute is a tightly woven prohibition and should not be expanded upon so readily:

> Congress drafted this statute with exacting precision. As its principal sponsor, Senator McClellan, put it:
>
> "/A/ bill as controversial as this . . . requires close attention to the dotting of every 'i' and the crossing of every 't'. . . . /Citation omitted./
>
> Under these circumstances, the exact words of the statute provide the surest guide to determining Congress' intent . . . .

United States v. Donovan, 429 U.S. 413, 441 (1977) (Mr. Chief Justice Burger, concurring in part and concurring in the judgment).

The result is anomalous under the Court of Appeals ruling: the federal authorities may not obtain authorization for a wiretap when the suspected crime is tele-

phone toll fraud, but may use the fruits of a warrantless wiretap performed by the telephone company to pursue a prosecution for the same crime.

This Court has ruled upon one other exception to the general prohibition of wiretapping listed in § 2511. In United States v. United States District Court, 407 U.S. 297, 320-321 (1972), this Court ruled upon § 2511(3), holding that "an appropriate prior warrant procedure" is required under the statute even in cases relating to the exercise of presidential powers in matters affecting "the domestic aspects of national security." Petitioner suggests that Congress would not require the President to obtain prior judicial approval in matters affecting the national security, while allowing the telephone company to perform warrantless wiretaps in pursuit of a toll fraud prosecution.

Several Courts of Appeals have ruled upon the scope of § 2511(2)(a)(i); all recognize the legitimacy of warrantless toll fraud wiretapping by the tele-

phone company.[1/] This Court has denied certiorari in five of these cases. This Court in its supervisory role should grant certiorari to review this perceived broad exception to such a carefully drafted statute.

2. Unconstitutional Government Action

The federal government has been sufficiently entangled with the telephone company's actions for the investigation to

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1. United States v. Savage, 564 F. 2d 728 (5th Cir. 1977); United States v. Cornfeld, 563 F. 2d 967 (9th Cir. 1977), cert. denied, ___ U.S. ___ (1978); United States v. Bowler, 561 F. 2d 1323 (9th Cir. 1977); United States v. Manning, 542 F. 2d 685 (6th Cir. 1976), cert. denied, 429 U.S. 1092 (1977); United States v. Jones, 542 F. 2d 661 (6th Cir. 1976); United States v. Harvey, 540 F. 2d 1345 (8th Cir. 1976); United States v. Auler, 549 F. 2d 642 (7th Cir. 1976), cert. denied, 429 U.S. 1104 (1977); United States v. Goldstein, 532 F. 2d 1305 (9th Cir. 1976), cert. denied, 429 U.S. 960 (1976); United States v. Freeman, 524 F. 2d 337 (7th Cir. 1975), cert. denied, 424 U.S. 920 (1976); United States v. Glanzer, 521 F. 2d 11 (9th Cir. 1975); United States v. Clegg, 509 F. 2d 605 (5th Cir. 1975).

constitute government action limited by the Fourth Amendment.

Early in its investigation the telephone company enlisted the state court and state authorities to search for illegal toll fraud devices. The telephone company later gathered evidence for the government and disclosed the contents of the interceptions to the FBI and the United States Attorney. The federal authorities used this information to obtain a search warrant, pursuant to which the property was seized.

The telephone company has cooperated with the federal authorities to use § 2511 as a license for the telephone company to make interceptions of private conversations to further a program of prosecutions. Under the guise of protecting its economic interests, the telephone company is working with the federal authorities to circumvent the procedural protections of § 2518 normally afforded government wiretaps. By failing to demand recoupment from Petitioner, by disclosing the contents of the wiretaps to the federal authorities, and by saving the wiretap tapes for use as

evidence, the manifest purpose of the interceptions has been the pursuit of criminal prosecution.

Assuming § 2511 can legitimately be construed to authorize the telephone company to intercept wire communications and to disclose them to the federal authorities as part of a criminal prosecution, then this in itself is government action requiring Fourth Amendment protections.

The position of the government amounts to a variation of the silver platter doctrine, first enunciated by Mr. Justice Frankfurter in Lustig v. United States, 338 U.S. 74, 78-79 (1949): "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to federal authorities on a silver platter."

This Court concluded in Elkins v. United States, 364 U.S. 206, 208 (1960), that the silver platter doctrine is no longer acceptable; although the search in Elkins did not involve federal officers, evidence obtained as a result of an unrea-

sonable search and seizure by state officers could not be introduced in evidence against a defendant in a federal criminal trial. In the case at bar, Petitioner believes the wiretapping performed by the telephone company as a part of a continuum of prosecutorial effort constituted unreasonable search and seizure and is therefore inadmissable.

Petitioner recognizes cooperation between the telephone company and the federal authorities to deter toll fraud schemes is necessary and is to be encouraged. Yet the federal authorities should not be allowed to accomplish through circuitous means what they themselves may not properly do. Cf. Elkins v. United States, supra at 221-222.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

DATED this 18th day of July, 1978.

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*Counsel for Petitioner acknowledges that, with minor changes, this petition is copied from the petition submitted by William J. Bender for Lourdes Maravilla, petitioner's co-defendant in this proceeding.

(78-5082)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, vs. LOURDES MARAVILLA and WILLIAM MIEBACH, Defendants.	No. CR77-172V. BEFORE JUDGE VOORHEES. Wed., Sept. 14, 1977.

COURT'S ORAL OPINION ON DEFENDANTS' MOTION TO SUPPRESS

THE COURT: Before making my ruling I think I should make a couple of factual findings, and I will, that on the basis of the affidavits I have examined I do make the finding that neither Pat Sainsbury, who is with the King County prosecutor's office, nor Mr. Diskin authorized any representative of the telephone company to place this particular tap on the wires in question.

I find too that the four minute interval was reasonable under the circumstances.

The telephone company had prior knowledge that calls were being made overseas, and I think I can take judicial notice of the fact from the few telephone calls that I have made overseas that four minutes may be barely long enough to be on the line in order to have the party being called get on the line and respond to it.

I find that the controlling decisions and the law here warrant this kind of procedure followed by the telephone company, and that it is not in violation of the Fourth Amendment rights of these defendants.

So therefore the motion to suppress will be denied, and I guess that is all I need to say.

I think probably what we should do is get a written order reflecting this, Mr. Diskin.

MR. BENDER: Just if I may, your Honor.

THE COURT: All right.

MR. BENDER: In the interest of the completeness of this record is the Court also finding that the procedure does not violate the requirements of 18 U.S.C. 2510 et seq. as well?

THE COURT: Right, I do find that. Is that satisfactory, Mr. Diskin? Any

reason why I should not make that finding?

MR. DISKIN: None that I can think of, your Honor.

THE COURT: All right.

MR. BENDER: I would ask the Court to specifically find that the purpose of the tapping by the telephone company was to further a prosecution and the resulting case.

THE COURT: Well, I would find this, that the primary purpose of the telephone company in so acting was to protect the corporate revenues and that in this particular case it may have felt that the best way to protect the corporate revenues was a prosecution for violation of federal law.

MR. BENDER: If I may, your Honor, I think that misspeaks the record slightly.

THE COURT: I don't think it does.

MR. BENDER: The testimony was that the purpose was always to prosecute, and I would ask the Court to so find.

THE COURT: No, I am going to make the finding that in this particular case on this particular tap the fundamental purpose was to protect the corporate revenues and that in this situation the decision was made that that could best be done by proceeding for

violation of federal law. All right, anything further?

THE CLERK: May this Exhibit 1 be withdrawn? It's a search warrant.

THE COURT: Did you need the search warrant back? Possibly you would want that as an exhibit in this proceeding.

MR. BENDER: I believe, your Honor, it is attached to the affidavit and brief of Mr. Diskin, so I have no need to have it in the record twice.

MR. DISKIN: Let me withdraw it for now, your Honor. It may come in during the government's case in chief if necessary.

THE COURT: All right. If you need it on appeal for any reason you can certainly get it in the record.

MR. DISKIN: Yes, your Honor.

THE COURT: All right.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM MIEBACH, a/k/a WILLIAM LINDSTROM, and LOURDES MARAVILLA, Defendants.	))))NO. CR77-172V)))))

ORDER DENYING DEFENDANTS' MOTION TO SUPPRESS AND RETURN PROPERTY SEIZED

Having considered the above motion filed by Defendant Maravilla on July 21, 1977, and joined in by Defendant Miebach on September 14, 1977; and

Having considered the Government's response filed August 12, 1977; and

Having conducted an evidentiary hearing into the matter on September 14, 1977,

The Court makes the following findings of fact:

1. Neither Pat Sainsbury of the King County Prosecutor's Office nor Francis J. Diskin, Assistant United States Attorney authorized any representative of Pacific

Northwest Bell to tap the telephone line in the instant case;

2. The four (4) minute setting on the timer which controlled the Sony tape recorder was reasonable in light of the phone company representatives' knowledge that the allegedly fraudulent calls were being made overseas;

3. The primary purpose of the telephone company in taping the line in the instant case was to protect its corporate revenues; and

4. The controlling decisions and the law warrant the procedures followed by the telephone company in the instant case; and

5. The procedures employed by the telephone company violated neither the defendants' Fourth Amendment rights nor the requirements of Title 18, United States Code, Section 2510 et seq. Accordingly, the defendants' motion to suppress and return property is DENIED.

DATED this 23 day of September, 1977.

/s/ DONALD S. VOORHEES
United States
District Judge

Presented by:

/s/ FRANCIS J. DISKIN
Assistant United States Attorney

/s/ WILLIAM J. BENDER
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM MIEBACH and LOURDES MARAVILLA, Defendants.	NO.CR77-172V

TRANSCRIPT OF PROCEEDINGS had in the above-entitled and numbered cause before the Honorable DONALD VOORHEES, a United States District Court Judge, at the hour of three-thirty o'clock p.m. on the 30th day of September, 1977, in the United States District Courthouse, Seattle, Washington.

APPEARANCES

Appearing for and on behalf of the Plaintiff was JERRY DISKIN, Assistant United States Attorney, United States Courthouse, Seattle, Washington;

Appearing for and on behalf of the Defendants were ANTHONY SAVAGE, JR., Attorney at Law, Seattle, Washington, and WILLIAM

BENDER, Attorney at Law for the Federal Public Defender's Office, Seattle, Washington.

WHEREUPON, the following proceedings were had:

THE CLERK: United States versus William Miebach, # CR77-188V, and United States versus Lourdes Maravilla, # 77-172V.

THE COURT: Mr. Diskin, do you have a copy of the Indictment, well perhaps, perhaps I won't even need it. As I understand it, what is going to happen here today is that the case will be tried on agreed facts, is that correct?

MR. DISKIN: That's correct, your Honor.

THE COURT: No witnesses?

MR. DISKIN: No witnesses.

THE COURT: Let's proceed and if I have to see the Indictment I'll borrow a copy.

MR. DISKIN: Each of the Defendants have signed a stipulation of facts and that would be offered in evidence, your Honor.

THE COURT: All right. I am now looking at a nine page document which is signed by Mr. Diskin, Mr. Bender and Mr. Savage. Then there is Mr. Miebach's signature--- is that your signature?

MR. MIEBACH: My signature.

THE COURT: (continues) - And, is this your signature, Ms. Maravilla?

MS. MARAVILLA: Yes, your Honor.

THE COURT: Very well, all right.

MR. DISKIN: Your Honor, the Government has, by that stipulation, has offered certain documents and objects into evidence which the Clerk of the Court has.

The Government also has Plaintiff's Exhibit #1 which is a diagram of the telephone switching network which is described in the stipulation of facts for the Court's use if you wanted to look at it when you read the stipulation.

I also have a tape of the telephone calls on the recorder if the Court desires to hear it. The Court can perhaps decide what it wants to look at.

THE COURT: Are you suggesting that I do it right now?

MR. DISKIN: That is the Government's case, your Honor.

THE COURT: Is there going to be any defense testimony?

MR. SAVAGE: No, your Honor. I think we got our evidence before during the motion to suppress which was denied and an order entered.

THE COURT: I presume then you are preserving your record on the motion to suppress rather than pleading guilty and have the Court make a finding of guilty. Well, let me read the stipulation and see if there is proof of guilt beyond a reasonable doubt or there isn't. Would you please hand me a copy of the Indictment?

MR. SAVAGE: Yes, your Honor, this is a copy of the Indictment - (hands Indictment to the Court).

THE COURT: Now Mr. Diskin, this Exhibit #11 is the blue box referred to?

MR. DISKIN: Yes, your Honor.

THE COURT: This was picked up with a search warrant?

MR. DISKIN: That is it, your Honor.

THE COURT: I see. All right, I would find from all of the facts stipulated to that the guilt of the Defendants, William Miebach and Lourdes Maravilla, has been proven beyond a reasonable doubt. I

would make that finding and--

MR. DISKIN: (Interposes)- Excuse me, your Honor.

THE COURT: All right, prior to making that finding, I think for the record that each defendant should waive a jury and also, I was just assuming that there was going to be no testimony from the defense--just a moment--Mr. Tveten, strike the comment that I made after reading the stipulation of facts.

COURT REPORTER: Yes, your Honor.

THE COURT: First, let me ask Counsel, do you wish to make an opening statement?

MR. DISKIN: I do not, your Honor.

MR. BENDER: No opening statement, your Honor.

MR. SAVAGE: No, your Honor.

THE COURT: All right. I have received this stipulation of fact and I have read this stipulation of fact. Does the Government have any further evidence?

MR. DISKIN: No, the Government would rest.

THE COURT: All right. Now perhaps I should have done this first so let me

address this to both of the defendants and first I would speak to Mr. Miebach.

You do have the right to a jury trial, you have the constitutional right to a jury trial. This Court cannot try this case unless you waive your right to a jury and consent to the trying of the case by the Court. Do you waive that right to a jury trial?

MR. MIEBACH: Yes, your Honor.

THE COURT: You have talked that over with your attorney, Mr. Savage, and he has recommended that you do that?

MR. MIEBACH: Yes.

MR. SAVAGE: Yes, your Honor, that has been my recommendation.

THE COURT: All right, then Mr. /sic/ Maravilla, I would say the same thing to you. You have the constitutional right to a jury trial and this Court cannot try this case unless you waive your right to a jury and consent to the trial of this case by the Court rather than by a jury. So, do you waive a jury?

MS. MARAVILLA: Yes, your Honor.

THE COURT: You have talked this over with your attorney, Mr. Bender?

MS. MARAVILLA: Yes, sir.

THE COURT: Is that correct, Mr.Bender?

MR. BENDER: Yes, your Honor, right.

THE COURT: All right, do you have a written waiver of jury?

MR. DISKIN: It has not been prepared, your Honor.

THE COURT: I think it might be well to reduce this to writing.

MR. DISKIN: Fine, your Honor.

THE COURT: All right then, I have asked if Counsel wished to make an opening statement, now does Counsel wish to present any evidence?

MR. SAVAGE: No, your Honor.

MR. BENDER: No, your Honor.

THE COURT: Now, as to the parties testifying or not testifying, has that been brought to the defendants' attention?

MR. SAVAGE: Yes, your Honor, Mr. Miebach has indicated he does not wish to testify.

THE COURT: Let me ask this--Mr. Miebach, you understand that you have the right either to testify or not to testify?

MR. MIEBACH: Yes.

THE COURT: You have made that decision, is that it?

MR. MIEBACH: Yes.

THE COURT: You have discussed this with your counsel, Mr. Savage, is that correct?

MR. MIEBACH: Yes, sir.

MR. SAVAGE: That is correct, your Honor.

THE COURT: All right, and Ms. Maravilla, let me say the same thing to you. You have the right either to testify or not to testify, and as I understand it, you have made the decision not to testify, is that correct?

MS. MARAVILLA: That's correct.

THE COURT: And as I understand it, you have discussed this with your counsel, Mr. Bender?

MS. MARAVILLA: Correct, yes.

THE COURT: Let me hand these two waivers of the right to testify to the Clerk so they may be filed. Is there anything further, procedurally?

MR. DISKIN: Perhaps only as to argument on behalf of their clients, your Honor.

MR. BENDER: Only as to one count. My client, as the Indictment indicates, is charged with three counts; Counts 2 and 3

being specific telephone calls made by her and as the Court has indicated the evidence is sufficient as to Count One, but my client is not charged with making telephone calls, she is charged with participating over a period of time, April 1 through April 28th and pursuant to the stipulation, those calls were made to the Defendant Mr. Miebach by her.

I would suggest to the Court that on the face of the stipulation which is before the Court, that my client's participation in the general scheme over the period of time is not established beyond a reasonable doubt--I am limiting my remarks simply to Count One. I would suggest that proof of the calls having been made as recited in Count One is proof which applies to the Defendant Mr. Miebach and not to my client.

THE COURT: Mr. Savage, do you have anything along that line?

MR. SAVAGE: I am in agreement with the remarks of Mr. Bender, your Honor.

THE COURT: With respect to his client or with respect to your client?

MR. SAVAGE: Of course you must have more than one for a conspiracy and--

THE COURT: --Mr. Diskin?

MR. DISKIN: Your Honor, Count One charges aiding and abetting and not conspiracy. Secondly, I would submit to the Court, a scheme as I understand it is a design or a plan formed to accomplish a purpose; and a scheme, within the meaning of the statute, is a plan to devise some trick to obtain something of value sometime during the dates charged.

I would submit that the stipulation of fact indicates the defendants formed such a scheme, part of the execution of that scheme, with the call she herself made as evidenced by the stipulation--one having to do with pretending to be the Denver operator and another the adjusting of the blue box in an attempt to defraud the telephone company and as the stipulation also indicates, and that indicates that as far back as April of 1977 a number of calls were going out over that line to various locations, and I think it is in the stipulation that on some of these calls she herself made it appear that she was the Denver operator and this shows as evidence of her participation in that scheme.

THE COURT: As charged in the statute--

MR. DISKIN: --18 U.S.C.--1343 having to do with devising any scheme or artifice to defraud by transmitting or cause to be transmitted by means of wire communication in interstate commerce any signals or sounds for the purpose of executing such a scheme ar artifice shall be guilty of a criminal offense and ---

THE COURT: --That is U.S.C. 1343?

MR. DISKIN: Correct, your Honor.

THE COURT: Mr. Bender, I would hear further from you if you have something further?

MR. BENDER: The Government can prove facts necessary to sustain my client's participation as to Counts 2 and 3, there is no doubt about that.

As to Count 1, one telephone call is charged and your Honor under the theory that Mr. Diskin is reciting here, if that be correct, then you have a multiplicity, in other words, the Government would have to elect to have trick, device, or scheme under Count 1 or two or three and I don't think the Government can meet the burden and their theory is not right. The Government

has to elect at this point as to which count it is proceeding to judgment on, and I would then suggest that the thrust of the proof as to my client is that she made phone calls and the selection must be for Counts 2 and 3, and Count 1 must fail, as I see it.

THE COURT: Well, it seems to me that in order to find either of the defendants guilty that I have to find under the statute that there was a scheme and that pursuant to the scheme, something was done, and I am going to find in light of this stipulation of fact that it has been proven beyond a reasonable doubt that the crime charged in Paragraphs one and two of each of the counts was committed, and in looking through these then that means on Counts one, two, and three I find the Defendant Maravilla guilty as charged and Counts one, two, three, four, five, six, seven and eight,I find the Defendant Miebach guilty as charged.

Now, is there anything further? It should be reduced to writing, I think it might be well to do that.

MR. DISKIN: I will be happy to do that.

THE COURT: What I have said here may or may not stand, but get it to Counsel and then

I will sign it.

MR. DISKIN: Very well.

THE COURT: Is there anything further?

MR. DISKIN: The sentencing date, your Honor.

THE COURT: Very well, the sentencing will be Friday, October 28th, at nine-thirty, Friday morning, and of course both of you defendants must be present. Anything further?

MR. DISKIN: Merely exhibits were offered in evidence as part of the stipulation and so I would ask to withdraw them if that is agreeable with Counsel.

MR. BENDER: Yes.

MR. SAVAGE: Yes.

THE COURT: That will be fine then and I will return the copy of the indictment back to you, Mr. Savage, and as to the stipulation of fact, do you want that marked as an exhibit or filed?

MR. DISKIN: Just filed in the case as such, your Honor.

THE COURT: The stipulation signed by everyone has been handed to the Clerk to be filed in the file of the case.

Very well, thank you very much and Court will at this time adjourn.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOURDES MARAVILLA, Defendant-Appellant.	)	NO. 77-3618
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM MIEBACH, Defendant-Appellant.	)	NO. 77-3872
	)	MEMORANDUM

Appeal from the United States District Court for the Western District of Washington

Before TRASK and HUG, Circuit Judges, and GRAY, District Judge*

The appellants were convicted of telephone toll fraud in violation of 18 U.S.C. § 1343, by means of a "blue box" device. They complain that their prosecution stemmed from a wiretap utilized by the telephone company to establish the perpetration of such fraud, and that the wiretap was in violation of their Fourth Amendment rights.

The appellants acknowledge that the issues that they seek to raise have been decided against them by this court in United States v. Cornfeld, 563 F.2d 967 (9th Cir. 1977); United States v. Goldstein, 532 F.2d 1305 (9th Cir. 1976); and United States v. Glanzer, 521 F.2d 11 (9th Cir. 1975). This panel has neither the authority nor the inclination to overrule those decisions.

The judgment of conviction is affirmed.

Filed June 21, 1978

*Honorable William P. Gray, United States District Judge for the Central District of California, sitting by designation.

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

AMENDMENTS

1970—Pub. L. 91-452, title II, § 227(b), Oct. 15, 1970, 84 Stat. 930, struck out item 2514 "Immunity of witnesses", which section was repealed four years following the sixtieth day after Oct. 15, 1970.

1968—Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 212, added chapter 119 and items 2510 to 2520.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in title 42 section 3795; title 47 section 605.

CHAPTER REFERRED TO IN D.C. CODE

This chapter is referred to in section 23-556 of the District of Columbia Code.

§ 2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 212.)

CONGRESSIONAL FINDINGS

Section 801 of Pub. L. 90-351 provided that:

"On the basis of its own investigations and of published studies, the Congress makes the following findings:

"(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

"(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

"(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain

evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

"(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused."

NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE

Section 804 of Pub. L. 90-351, as amended by Pub. L. 91-452, title XII, § 1212, Oct. 15, 1970, 84 Stat. 961; Pub. L. 91-644, title VI, § 20, Jan. 2, 1971, 84 Stat. 1892; Pub. L. 93-609, §§ 1 to 4, Jan. 2, 1975, 88 Stat. 1972, 1973; Pub. L. 94-176, Dec. 23, 1975, 89 Stat. 1031, established a National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, provided for its membership, Chairman, powers and functions, compensation and allowances, required the Commission to study and review the operation of the provisions of this chapter to determine their effectiveness and to submit interim reports and a final report to the President and to the Congress of its findings and recommendations on or before Apr. 30, 1976, and also provided for its termination sixty days after submission of the final report.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 3504 of this title.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chap-

ter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143;[1] 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of

the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 213, and amended Pub. L. 91-358, title II, § 211(a), July 29, 1970, 84 Stat. 654.)

AMENDMENTS

1970—Subsec. (2)(a). Pub. L. 91-358 designated existing provisions as cl. (i), and added cl. (ii).

EFFECTIVE DATE OF 1970 AMENDMENT

Section 901(a) of Pub. L. 91-358 provided in part that the amendment by Pub. L. 91-358 shall take effect on the first day of the seventh calendar month which begins after July 29, 1970.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2513 of this title.

§ 2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices prohibited

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

[1] So in original. Probably should be 1103.

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 214.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2513 of this title.

§ 2513. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code (2)

the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 215.)

[§ 2514. Repealed. Pub. L. 91-452, title II, § 227(a), Oct. 15, 1970, 84 Stat. 930]

Section, Pub. L. 90-351, title II, § 802, June 19, 1968, 82 Stat. 216, provided for immunity of witnesses giving testimony or producing evidence under compulsion in Federal grand jury or court proceedings. Subject matter is now covered in sections 6002 and 6003 of this title.

EFFECTIVE DATE OF REPEAL

Sections 227(a), 260 of Pub. L. 91-452 provided for repeal of this section effective four years following sixtieth day after date of enactment of Pub. L. 91-452, which was approved Oct. 15, 1970, such repeal not affecting any immunity to which any individual was entitled under this section by reason of any testimony or other information given before such date. See section 260 of Pub. L. 91-452, set out as a note under section 6001 of this title.

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the

disclosure of that information would be in violation of this chapter.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 216.)

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, ac-

ceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 (violations with respect to congressional assassination, kidnaping, and assault);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 216, and amended Pub. L. 91-452, title VIII, § 810, title IX, § 902(a), title XI, § 1103, Oct. 15, 1970, 84 Stat. 940, 947, 959; Pub. L. 91-644, title IV, § 16, Jan. 2, 1971, 84 Stat. 1891.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in par. (1)(a), is act Aug. 30, 1954, ch. 1073, 68 Stat. 921, which is classified generally to chapter 23 (§ 2011 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of Title 42 and Tables volume.

AMENDMENTS

1971—Par. (1)(c). Pub. L. 91-644 added provision authorizing interception of communications with respect to section 351 offense (violations with respect to congressional assassination, kidnaping, and assault).

1970—Par. (1)(c). Pub. L. 91-452 added provisions authorizing applicability to sections 844(d), (e), (f), (g), (h), or (i), 1511, 1955, and 1963 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2514, 2518 of this title.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving

testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 217, and amended Pub. L. 91-452, title IX, § 902(b), Oct. 15, 1970, 84 Stat. 947.)

AMENDMENTS

1970—Par. (3). Pub. L. 91-452 substituted "proceeding held under the authority of the United States or of any State or political subdivision thereof" for "criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding".

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2518 of this title.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order

should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an

individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compen-

sated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this sec-

tion within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later

than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 218, and amended Pub. L. 91-358, title II, § 211(b), July 29, 1970, 84 Stat. 654.)

AMENDMENTS

1970—Subsec. (4). Pub. L. 91-358 added the provision that, upon the request of the applicant, an order authorizing the interception of a wire or oral communication direct that a communication common carrier, landlord, custodian, or other person furnish the applicant with all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services provided.

EFFECTIVE DATE OF 1970 AMENDMENT

Section 901(a) of Pub. L. 91-358 provided in part that the amendment by Pub. L. 91-358 shall take effect on the first day of the seventh calendar month which begins after July 29, 1970.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2516, 2519 of this title.

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such reports shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 222.)

SECTION REFERRED TO IN D.C. CODE

This section is referred to in section 23-555 of the District of Columbia Code.

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a

day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

(Added Pub. L. 90-351, title III, § 802, June 19, 1968, 82 Stat. 223, and amended Pub. L. 91-358, title II, § 211(c), July 29, 1970, 84 Stat. 654.)

AMENDMENTS

1970—Pub. L. 91-358 substituted provisions that a good faith reliance on a court order or legislative authorization constitute a complete defense to any civil or criminal action brought under this chapter or under any other law, for provisions that a good faith reliance on a court order or on the provisions of section 2518(7) of this chapter constitute a complete defense to any civil or criminal action brought under this chapter.

EFFECTIVE DATE OF 1970 AMENDMENT

Section 901(a) of Pub. L. 91-358 provided in part that the amendment by Pub. L. 91-358 shall take effect on the first day of the seventh calendar month which begins after July 29, 1970.